



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 15 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for
Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petitioner seeks to substitute the beneficiary named in the petition for the original beneficiary named on the ETA 750. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel asserts that the director erred in concluding that the petitioner had not established that it had the financial ability to pay the proffered wage to the beneficiary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 2, 1998. The proffered wage as stated on the Form ETA 750 is \$60,000 per annum. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1982, to have a gross annual income of 1.2 million dollars, and to currently employ fifteen workers. In support of its ability to pay the proposed wage offer of \$60,000 to the beneficiary, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. It shows that the petitioner files its taxes typically using a fiscal year running beginning on August 31st and ending on August 31st of the following year. In the fiscal year 2000 (8/31/2000 to 8/31/2001), the

petitioner declared a taxable income before the net operating loss (NOL) deduction of -\$55,860. Schedule L of the tax return shows that the petitioner had \$198,977 in current assets and \$28,400 in current liabilities, resulting in \$170,487 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets and current liabilities are shown on Schedule L. Besides net income, CIS will consider a petitioner's net current assets as an alternative method of demonstrating its financial ability to pay a proffered salary. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On June 7, 2002, the director instructed the petitioner to submit additional evidence demonstrating its continuing ability to pay the proffered salary. The director advised the petitioner that the evidence of this ability must be shown by either annual reports, federal tax returns, or audited financial statements. The director also specifically requested that the petitioner provide copies of federal tax returns to cover the fiscal years of 1998, 1999, and 2000 and 2001.

In response, the petitioner provided copies of the petitioner's 1998 and 1999 federal tax returns. In a transmittal letter, dated July 19, 2002, counsel advised that the 2001 federal tax return was not yet available because the fiscal year did not end until August 31, 2002. The 1998 and 1999 tax returns reflect the petitioner's financial information beginning September 1, 1998 through August 31, 2000. They reveal the following information:

	1998	1999
Net income (before NOL deduction)	\$ 84,691	-\$ 16,579
Current Assets	\$196,077	\$196,257
Current Liabilities	\$ 85,362	\$ 45,760
Net current assets	\$110,715	\$150,497

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and denied the petition on January 30, 2003.

On appeal, counsel asserts that the director erred in solely relying on the petitioner's tax returns. While counsel is correct that the law does not require sole reliance on tax returns, in this case, that is the only financial information provided to the record. The director advised the petitioner that the evidence may also consist of audited financial statements or annual reports pursuant to 8 C.F.R. § 204.5(g)(2), but the petitioner elected not to submit those kinds of documents.

Where federal tax return have been provided, reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

1305 (9th Cir. 1984); *see also* *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel also asserts that it is questionable whether cases arising outside the Ninth Circuit, as cited by the director, would apply in this case. Counsel, however, cites no authority from the Ninth Circuit that would prohibit CIS from considering the information appearing in the petitioner's tax returns. While the court in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman* did not specifically address the form of documents in which a petitioner's financial data may be presented, it found that the determination of a petitioner's financial ability to pay a proffered wage is completely within the authority of the INS, now CIS, and that the decision must be upheld if supported by substantial evidence. *Tongatapu Woodcraft Hawaii, Ltd.* at p. 1309.²

Counsel further states that the director had previously approved other immigrant and non-immigrant petitions submitted by this petitioner and that this should support its ability to pay in this case. It must be noted that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In determining statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, if previous approvals may have occurred in error, it would be absurd to suggest that CIS or any other agency must treat such errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F. 2d 1084, 1090 (6th Cir. 1987), *cert. denied* 485 U.S. 1008 (1988).

That said, the director erred in failing to consider the petitioner's net current assets and failing to consider other immigrant petitions the petitioner filed in determining the petitioner's ability to pay this beneficiary. First, as noted above, the petitioner's net current assets in 1998, 1999, and 2000 were sufficient to cover the beneficiary's proposed wage offer of \$60,000. This determination, however, must be made in the context of other petitions that have been filed covering the consideration of the petitioner's financial ability relevant to the time period beginning April 2, 1998 and continuing to the present. The petitioner must show that it has had sufficient income to pay all wages of all beneficiaries. CIS electronic records indicate that at least seven other employment based petitions have been filed by this petitioner that may have involved consideration of the same financial data at the time of approval. Without reviewing the filing date, priority date, approval or pending status, financial information, and salaries involved in those cases, it is not clear whether the petitioner has demonstrated the continuing financial ability to pay this beneficiary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

² Although not official guidance, a Ninth Circuit unpublished 1996 decision, No. 95-35142, clearly suggests that absent unusual circumstances, the regulations require either annual reports, audited financial statements or federal tax returns.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.